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No. 94-1033

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In the Supreme Court of the United States

OCTOBER TERM, 1994

NORTHEAST UTILITIES SERVICES CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals reasonably concluded that petitioner's senior pool coordinators and pool coordinators are neither "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act nor "managerial employees."

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In the Supreme Court of the United States

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No. 94-1093

NORTHEAST UTILITIES SERVICES CORPORATION,
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v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 35 F.3d 621. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. B1-B7) is unreported, but is noted at 313 N.L.R.B. No. 65 (Table). The Regional Director's decision and direction of election in the underlying representation proceeding (Pet. App. D1-D39), and the Board's order denying petitioner's request for review of that decision (Pet. App. C1-C2), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1994. The petition for a writ of certiorari was filed on December 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner provides manpower and administrative support to utilities and collectives that buy and sell electric power. Pet. App. B2, D4. One of its customers is the New England Power Pool (NEPOOL), an association of approximately 100 electric utility companies. The NEPOOL companies operate about 300 generating plants in Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island. *Id.* at A3, D3. Under its service contract with NEPOOL, petitioner staffs NEPOOL's three operating divisions. The operating division involved here is NEPEX, which regulates the day-to-day production, sale, and purchase of power by the 300 generating plants in the NEPOOL system. *Id.* at A3-A4, D4.

The NEPEX control room in Holyoke, Massachusetts, is the master control center of the NEPOOL system. Pet. App. A4, D7. The control room is staffed by a supervisor, an assistant supervisor, six "senior pool coordinators" (SPCs), and twelve "pool coordinators" (PCs). *Id.* at D5.[1] The control room operates 24 hours per day, 365 days per year. The supervisor and assistant supervisor work from 8:30 a.m. to 4:00 p.m. Monday

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[1] The control room supervisor reports to NEPEX's operations manager, who in turn reports to NEPEX's director. Pet. App. D6. The assistant control room supervisor, control room supervisor, operations manager, and director are "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11). Pet. App. D6-D7.

through Friday and are on call at all other times. Teams consisting of one SPC and two PCs work twelve-hour shifts (beginning at 7:00 a.m. and 7:00 p.m.) every day of the week. *Id.* at A4, D9.

The SPCs and PCs are responsible for buying and selling power among the member utilities as economically as possible while avoiding power outages. They may also order repair services for control room equipment from the NEPEX engineering department. Pet. App. A4, D18. One of the two PCs on a shift serves as the "generation/load" PC, while the other PC serves as the "transmission/security" PC. *Id.* at A5, D9. The "generation/load" PC's duties include buying and selling power among member and nonmember plants and reserving sufficient unused capacity to ensure continued operation of the system in the event of a shutdown at the largest single plant, *id.* at A5, D14-D17; the "transmission/security" PC's duties include arranging for continued power in the event of a plant shutdown, directing the generation of power uneconomically to maintain the integrity of the system, monitoring the system to prevent "cascading," and ordering "loadshedding" in emergency situations.[2] *Id.* at A5, D17. The SPC's duties are similar to those of the PCs, but instead of focusing on the system's minute-to-minute requirements, the SPC focuses on the system's needs over the course of the entire shift. *Id.* at A5, D9. In discharging their duties, the SPCs and PCs follow

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[2] "Cascading" occurs when one line or transmission element goes out of service and thereby overloads other lines or transmission elements, causing them to fail. Pet. App. D17. "Loadshedding" is the short-term curtailment of all power in certain limited areas to avoid a larger, more lengthy loss of power. *Ibid.*

fourteen NEPEX operating procedures. The operating procedures address every aspect of their responsibilities and provide specific instructions and guidelines for the operation of the system. *Id.* at A4, D19.

Because of the size of the NEPOOL system, the SPCs and PCs do not communicate directly with the generating plants in the network. Rather, each plant in the system is a member of one of four regionally organized satellite operations, which functions as an intermediate layer of control between the NEPEX control room and the plant sites. Pet. App. A4, D7. Each satellite operation is staffed by people whose job duties are similar to those of the SPCs and PCs. *Id.* at D7-D8. The SPCs and PCs give instructions to their counterparts at the satellite operations, who relay those instructions to the affected plants. *Id.* at A4, D8, D18. The staff at CONVEX, the satellite operation covering plants in Connecticut and western Massachusetts, are, like the SPCs and PCs at NEPEX, employed by petitioner; the staffs at the other three satellite operations, however, are not employees of petitioner. *Id.* at A4, D7, D8.

2. On November 12, 1992, Local 455 of the International Brotherhood of Electrical Workers, AFL-CIO (the Union), filed a representation petition with the National Labor Relations Board (Board) seeking certification as the collective-bargaining representative of the SPCs and PCs employed by petitioner in the NEPEX control room. Gov't C.A. Br. 5; Pet. App. D5.[3]

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[3] Initially, the Union asserted that the SPCs and PCs were jointly employed by petitioner and NEPOOL. Pet. App. D5. The Board's Regional Director, however, found that petitioner was the sole employer of the SPCs and PCs, and accordingly dismissed the representation petition as to NEPOOL. *Id.* at D23. The Union did not challenge that finding in the court of appeals, and it is not at issue here.

Petitioner sought dismissal of the Union's petition on the ground that the SPCs and PCs are either "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act (Act), 29 U.S.C. 152(11), or, alternatively, are "managerial employees." Pet. App. D5.[4] After a hearing, the Board's Regional Director

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[4] Section 2(3) of the Act, 29 U.S.C. 152(3), excludes from the definition of "employee," and thus from the coverage of the Act, "any individual employed as a supervisor." Section 2(11) of the Act, 29 U.S.C. 152(11), defines supervisor to mean:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with "'genuine management prerogatives,'" and employees—such as "'straw bosses, leadmen, and set-up men'"—who enjoy the Act's protections even though they perform "'minor supervisory duties.'" *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess., at 4 (1947)). Although "managerial employees," like supervisors, fall outside the Act, they do so by virtue of judicial interpretation, rather than an explicit statutory exclusion. See *Bell Aerospace*, 416 U.S. at 283-289. An employee is considered managerial "only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *NLRB* v. *Yeshiva University*, 444 U.S. 672, 683 (1980). Such employees are "'much higher in the managerial structure' than those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.'" *Id.* at 682 (quoting *Bell Aerospace Co.*, 416 U.S. at 283).

rejected petitioner's contentions and ordered an election among the SPCs and PCs. *Id.* at D1-D39.

a. Although the Regional Director acknowledged that "the [SPCs] and [PCs] must have substantial experience and training in order to be selected for their positions," Pet. App. D8, she concluded that "[o]n balance * * * [petitioner] has fallen short of its burden of establishing that the disputed employees are supervisors within the meaning of the Act." *Id.* at D25.

First, the Regional Director found that the SPCs and PCs do not exercise "independent judgment" within the meaning of Section 2(11). Pet. App. D29. Rather, the Regional Director found that the SPCs and PCs "operate under comprehensive procedures from which they cannot vary without supervisory approval except in circumstances when there is not sufficient time to contact supervisors"; that, even in such circumstances, the SPCs and PCs "must immediately report their actions to their supervisors"; and that, while supervision is not present at all times, "it is available on an on-call basis, and the actions of the [SPCs] and [PCs] are closely reviewed by supervision by means of [a] daily audit." *Id.* at D27. Although "for periods of time the [SPCs and PCs] are the highest authority in the control room," the Regional Director noted that this fact did not establish that the SPCs and PCs are statutory supervisors, "in light of the predetermined nature of their duties and the on-call status of supervisory level employees." *Id.* at D29. The Regional Director also explained that, "which engineering department employee responds to the [SPC]'s or [PC]'s request for service is determined by that department," and, further, that "the speed of his response is predetermined" by one of NEPEX's fourteen operating procedures. *Id.* at D32.

The Regional Director further found that, even if the SPCs and PCs exercised "independent judgment," they did not "responsibly * * * direct" other employees within the meaning of Section 2(11). Pet. App. D31-D32. The Regional Director explained that "[n]either the [SPCs] nor the [PCs] has any authority or control over the satellite employees"; rather, "[i]f the satellite employee is resistant to, or slow in complying with, [an] instruction, the [SPC] or [PC] will note this in his log and will report it to the [NEPEX] control room * * * supervisor," who is the individual responsible for "contact[ing] the satellite employee's supervisor to discuss the matter." *Id.* at D18. The same procedure applied, the Regional Director found, in cases of deficient job performance by employees of the NEPEX engineering department. *Ibid.* Further, the Regional Director noted, there was no evidence that any satellite or engineering department employee's status has been affected by such a report or inquiry from a PC or SPC. *Id.* at D18-D19. The Regional Director also explained that "the [SPCs] and [PCs] have almost no direct contact with the employees who actually perform the work that their instructions require be done"; rather, "[the SPCs and PCs] communicate with the generation and transmission operations through the satellites." *Id.* at D27. [5]

Finally, the Regional Director found that the SPCs do not exercise statutory supervisory authority over the PCs. Pet. App. D33. The Regional Director explained

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[5] In distinguishing this case from those in which employees of utility companies have been found to be supervisors, the Regional Director noted the comprehensive nature of the operating procedures applicable to the SPCs and PCs and their lack of direct contact with the employees who actually perform the work required by their instructions. Pet. App. D27-D28.

that "[t]he [PC]'s schedule is set by higher level management and their work assignments are predetermined," and that, although the SPCs have authority to call in a "spare" PC to fill in for an absent PC (and to require the PC then working to stay on the job until the "spare" PC arrives for work), the exercise of such authority by the SPCs "is a matter of routine." *Ibid.* The Regional Director further noted that there was no evidence that "an [SPC]'s comments to supervision regarding a [PC]'s performance has [*sic*] ever affected the [PC]'s employment status." *Ibid.*

b. Next, the Regional Director found that the SPCs and PCs are not "managerial employees." Pet. App. D36. The Regional Director explained that "the [NEPEX] Operating Procedures and related guidelines limit the discretion of the [SPCs] and [PCs] in the areas of increasing or decreasing power, approving or disapproving outage requests, controlling hydroelectric operations, and entering into contracts for the purchase and sale of power." *Id.* at D34-D35.[6] The Regional Director also noted that the SPCs and PCs had no occasion to make discretionary judgments respecting the creditworthiness of purchasers of power from the NEPOOL system, nor did the contracts for the purchase and sale of power have any direct financial impact upon petitioner. *Id.* at D36.

3. Petitioner requested review of the Regional Director's decision by the Board. The Board, with one

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[6] The Regional Director pointed out that the SPCs and PCs purchase and sell power "on a simple cost basis * * * determin[ing] the cost effectiveness of their contemplated actions either by the use of a computer or by manual calculations using a predetermined set of generation costs for the various types of power available." Pet. App. D35.

member dissenting, denied petitioner's request as raising no issue warranting review. Pet. App. C1-C2. On May 11, 1993, the Union won the representation election and was thereafter certified by the Board as the collective-bargaining representative of the SPCs and PCs. *Id.* at B3. Petitioner refused to bargain with the Union, however, and the Board's General Counsel issued a complaint alleging that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. B1. The Board granted the General Counsel's motion for summary judgment based on its finding that petitioner's refusal to bargain constituted an unfair labor practice, as alleged in the complaint, and entered an appropriate order. *Id.* at B1-B7.

4. The court of appeals enforced the Board's order. Pet. App. A1-A11. The court rejected petitioner's contention that the SPCs and PCs are "supervisors" under Section 2(11) of the Act because they use "independent judgment" to "responsibly direct" employees at the CONVEX satellite and in the NEPEX engineering department. *Id.* at A7-A8.[7] The court recognized that the SPCs and PCs are "highly trained employees who use independent judgment to make and implement complex technical decisions that affect the entire region's power supply." *Id.* A8. The court explained, however, that, under its decision in *Maine Yankee Atomic Power Co.* v. *NLRB*, 624 F.2d 347, 361 (1st Cir. 1980), "[t]o be responsible is to be answerable for the discharge of a duty or obligation." Pet. App. A8

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[7] In the court of appeals, petitioner argued that the SPCs and PCs responsibly directed only the staff of NEPEX's engineering department and of CONVEX, presumably because the staff of the other three satellites are not employed by petitioner. See Pet. App. D8, D29-D30.

(quoting *Ohio Power Co.* v. *NLRB*, 176 F.2d 385, 387 (6th Cir.), cert. denied, 338 U.S. 899 (1949)). Applying that test, the court found that SPCs and PCs do not "responsibly * * * direct" CONVEX employees, for "[t]he uncontroverted evidence established that [they] are not answerable for the conduct of satellite operators," but rather "are permitted merely to report CONVEX employee failures to NEPEX upper management, and it is upper management at the satellite that is ultimately responsible for the actions of CONVEX operators." Pet. App. A8. Nor do the SPCs and PCs "responsibly * * * direct" the employees in the NEPEX engineering department, the court determined, since "there is no evidence that they answer for engineering or equipment failures." *Ibid.*

The court further held that the record did not support petitioner's claim that the SPCs "supervise" PCs because the SPCs are "in charge" of the shift during nonbusiness hours. Pet. App. A8. The court pointed out that "[n]othing in the record suggests that [the SPCs] had ultimate responsibility for the plant's performance during nonbusiness hours"; that a supervisor is always on call during nonbusiness hours; that the SPCs do not hire, evaluate, or assign work to the PCs; that the SPCs "only as a matter of routine * * * fill an open shift from a preexisting list"; and that "SPCs are simply not held accountable if a PC disobeys a direct order, misquotes a price or causes a blackout." *Ibid.*

Finally, the court rejected petitioner's contention that the SPCs and PCs are "managerial employees." Pet. App. A9-A10. The court explained that, "[g]enerally, employees may be excluded from a bargaining unit on the basis of managerial status only if they 'represent * * * management interests by taking or recommending discretionary actions that effectively control or

implement employer policy.'" *Id.* at A10 (quoting *NLRB* v. *Yeshiva University*, 444 U.S. 672, 683 (1980)). The court found a "paucity of evidence tending to show managerial powers in the PCs or SPCs" under that test, for "[m]anagement policy at NEPEX is embodied in the Operating Procedures formulated by the Operations Committee." *Id.* at A10. Furthermore, the court found "no evidence that PCs or SPCs have a role in creation or implementation" of the operating procedures, or that they have "the authority to issue new ones." *Ibid.* The court observed that, at the core of the managerial question is the alignment of workers' and employers' interests. *Ibid.* In the present case, the court determined that, "[o]ther than the common goal of keeping the lights on, the record shows no such congruence of interests between [petitioner] and [the SPCs and PCs] sufficient to warrant the latter's exemption from the Act" as managerial employees. *Ibid.*

ARGUMENT

The court of appeals correctly upheld the Board's determination that petitioner's PCs and SPCs are neither "supervisors" within the meaning of Section 2(11) of the Act nor "managerial employees," as that term has been judicially explicated. Moreover, the court's decision turns largely on the facts of this case and does not conflict with any decision of this Court or another court of appeals. Further review therefore is not warranted.

1. a. To determine whether petitioner's PCs and SPCs are "supervisors" on the ground that they have authority "responsibly to direct" other employees, the court of appeals relied on its decision in *Maine Yankee Atomic Power Co.* v. *NLRB*, 624 F.2d 347 (1st Cir. 1980). *Maine Yankee* stated that, for purposes of Section 2(11),

"[t]o be responsible is to be answerable for the discharge of a duty or obligation." Pet. App. A8 (quoting *Maine Yankee*, 624 F.2d at 361 (quoting *Ohio Power Co.* v. *NLRB*, 176 F.2d 385, 387 (6th Cir.), cert. denied, 338 U.S. 899 (1949))). That test was first articulated in *Ohio Power* and has generally been followed not only by the First Circuit but also by other courts of appeals (see pp. 14-15, *infra*). Applying the *Ohio Power* test here, the court held that petitioner's SPCs and PCs do not "responsibly * * * direct" other employees, since petitioner does not hold the SPCs and PCs "answerable for the conduct" of employees at the CONVEX satellite operation or "for engineering or equipment failures," nor does it hold the SPC on a shift "accountable" in the event that a PC "disobeys a direct order, misquotes a price or causes a blackout." Pet. App. A8.[8]

There is no merit to petitioner's contention (Pet. 10) that the court of appeals' construction of the statutory term "responsibly to direct" "superimpose[s] conditions on 'supervisory' status" that are inconsistent with this

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[8] Although the Regional Director did not expressly rely on the *Ohio Power* test, her findings support the court of appeals' holding that under that test the SPCs and PCs are not supervisors. The Regional Director found that the PCs and SPCs did not have the authority "responsibly to direct" employees at the CONVEX satellite and in the NEPEX engineering department because they have "no authority or control" over these employees; rather, in the event that these employees do not perform their jobs properly, the SPC's or PC's only recourse is to report the deficiency to his supervisor at NEPEX, who then contacts the offending employee's supervisor, whose duty it is to deal with the problem. Pet. App. D18, D31-D32. While petitioner "contests the factual basis" for the court of appeals' conclusions (Pet. 8), it does not show that the court so "grossly misapplied" the substantial evidence standard as to warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Court's decision in *NLRB* v. *Health Care & Retirement Corp.*, 114 S. Ct. 1778 (1994). *Health Care* involved the Board's construction of Section 2(11)'s phrase "in the interest of the employer," not the term "responsibly to direct." See 114 S. Ct. at 1780. The Court in *Health Care* invalidated the Board's rule that "a. nurse's supervisory authority is not exercised in the interest of the employer if it is incidental to the treatment of patients." *Id.* at 1782-1783. The Court made clear, however, that its holding "casts no doubt on Board or court decisions interpreting parts of [Section] 2(11) other than the specific phrase 'in the interest of the employer.'" *Id.* at 1785. Indeed, the Court specifically acknowledged that the phrase "responsibly to direct" is ambiguous and subject to interpretation by the Board and the courts with respect to particular categories of employees. *Id.* at 1783.[9]

b. There is also no merit to petitioner's claim (Pet. 8-9) that the decision of the court below conflicts with decisions of the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits holding that the control room personnel of a utility company were statutory supervisors.

As an initial matter, petitioner mischaracterizes the decision below. Contrary to petitioner's assertion, the test of "responsible direction" applied by the court of appeals does not require the employer to "produc[e] evidence that directives were not followed and the supervisor in fact was held responsible," Pet. 9. The

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[9] The Board is currently considering how to interpret the statutory phrase "responsibly to direct" in the health-care field, in light of this Court's decision in *Health Care*. See *Providence Hospital*, No. 19-RC-12866, and *Ten Broeck Commons Nursing Home*, No. 3-RC-10166; the Board heard oral argument in those cases on October 28, 1994.

court's test was satisfied by objective evidence that, if an employee at the CONVEX satellite operation or in the NEPEX engineering department does not perform properly, the SPC's or PC's only recourse is to report the deficiency to his or her supervisor at NEPEX, who then contacts the offending employee's supervisor, whose duty it is to deal with the problem. Pet. App. A8, D18.

There is no difference between the test applied by the court below and that applied in the decisions upon which petitioner relies in asserting a conflict. The other decisions have held that utility company control room personnel were supervisors by applying the same test to facts quite different from those of this case.

Thus, in *Monongahela Power Co.* v. *NLRB*, 657 F.2d 608 (1981), cited at Pet. 8, the Fourth Circuit applied the test of "responsible direction" set forth in *Ohio Power*, as did the court of appeals in this case, in assessing whether the employer's "control room foremen" were statutory supervisors. The Fourth Circuit determined that those employees were supervisors on the facts of that case. See 657 F.2d at 613.[10]

In *NLRB* v. *McCullough Environmental Services, Inc.*, 5 F.3d 923 (1993), cited at Pet. 8, the Fifth Circuit held that the "lead operators" at a wastewater treatment plant responsibly directed other employees. Although the Fifth Circuit in *McCullough* did not expressly rely on the *Ohio Power* test, it attached importance to a fact

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[10] The court in *Monongahela* found the functions of the control room foremen to be "quite similar" to those of the "shift operating supervisors" found to be statutory supervisors in *Maine Yankee*. 657 F.2d at 613. The court below, in contrast, found that *Maine Yankee* was factually distinguishable from the instant case. Pet. App. A9.

that is relevant under that test: It noted that the employer maintained a written policy of holding the lead operators responsible for the actions of employees on their shifts. 5 F.3d at 941 n.26. Moreover, the Fifth Circuit relied on *Maine Yankee*, which adopted the *Ohio Power* test, in another case involving the issue of responsible direction. See *NLRB* v. *KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986) ("In determining whether 'direction' in any particular case is responsible, the focus is on whether the alleged supervisor is 'held fully accountable and responsible for the performance and work product of the employees' he directs.") (quoting *Maine Yankee*, 624 F.2d at 361).

Nor is petitioner's claim of a circuit conflict supported by *Southern Indiana Gas & Elec. Co.* v. *NLRB*, 657 F.2d 878 (7th Cir. 1981), or *NLRB* v. *Detroit Edison Co.*, 537 F.2d 239 (6th Cir. 1976). In those cases, the courts determined that the duties of the "system supervisors" involved there were "strikingly similar" (*Southern Indiana*, 657 F.2d at 883) and "virtually identical" (*Detroit Edison*, 537 F.2d at 242) to those of the "system load supervisors" held to be statutory supervisors in *Arizona Public Service Co.* v. *NLRB*, 453 F.2d 228 (9th Cir. 1971). In *Arizona Public Service*, in turn, the court applied the *Ohio Power* test to hold that "system load supervisors" involved there responsibly directed other employees, 453 F.2d at 231. Thus, all three decisions—*Southern Indiana*, *Detroit Edison*, and *Arizona Public Service*—ultimately rested on an application, to particular factual circumstances, of the same test that was applied by the court below. See Pet. App. A8.

2. Petitioner also contends (Pet. 10-11) that its SPCs and PCs are "managerial employees" because they "implement" the policies set forth in the NEPEX operating procedures. That contention is without merit.

As discussed (note 4, *supra*), in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), this Court stated that an employee is managerial "only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *Id.* at 683. The court of appeals, applying that test, agreed with the Board that "[t]here is no evidence that PCs or SPCs have a role in the creation or implementation of the Operating Procedures." Pet. App. A10. The court of appeals' assessment of the evidentiary record is a factbound matter that does not warrant further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Moreover, petitioner errs in contending that the Board and the court of appeals "effectively have eliminated any impact of the phrase 'or implement' from this Court's language in *Yeshiva*." Pet. 10. In support of that contention, petitioner asserts that, within the framework of the operating procedures, the SPCs and PCs exercise considerable discretion. Petitioner's conception of what constitutes "implement[ing] employer policy" (*Yeshiva University*, 444 U.S. at 683), however, conflicts with the settled principle that "the authority to exercise considerable discretion does not render an employee managerial where his decision must conform to the employer's established policy." *NLRB* v. *Wilson-Crissman Cadillac, Inc.*, 659 F.2d 728, 730 (6th Cir. 1981); accord *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 288 n.16 (1974). Here, the Board found that the fourteen NEPEX operating procedures establish a comprehensive policy, "deal[ing] with every area of [their] duties and provid[ing] the [SPCs] and [PCs] with specific instructions, guidelines, and controls concerning their operation of the system." Pet. App. D10 n.4; see also *id.* at D21. In light of that finding, the Board reasonably

concluded (*id.* at D34-D35) that "the Operating Procedures and related guidelines limit the discretion of the [SPCs] and [PCs]" to such a degree as to warrant a finding that the SPCs and PCs are not managerial employees, and the court of appeals properly upheld the Board's conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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